

Obergefell's Legacy

MARK P. STRASSER*

INTRODUCTION

In *Obergefell v. Hodges*, the United States Supreme Court struck down same-sex marriage bans as a violation of federal constitutional guarantees.¹ This decision was very important for same-sex couples and their families, and may well be the springboard for the recognition of additional rights for sexual minorities and other marginalized groups.² Yet, *Obergefell* is surprising in both form and focus, which complicates not only predicting the decision's effects but even inferring what the opinion is trying to do beyond striking down the bans.

Part I of this article examines *Obergefell*'s discussion of due process guarantees, noting some of the ways in which the opinion is less persuasive than it might have been and offering some possible explanations of why the opinion was crafted this way. Part II discusses the equal protection analysis, explaining some of the ways in which the opinion complicates the jurisprudence. The article concludes by discussing some of the respects in which *Obergefell* is so open-ended that it could provide the basis for restricting or expanding equal protection and due process guarantees.

I. THE RIGHT TO MARRY

Many commentators expected the *Obergefell* Court to strike down same-sex marriage bans,³ at least in part because several circuit courts had struck down such bans and the Supreme Court had denied certiorari when those cases were

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* Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws.").

2. See Autumn L. Bernhardt, *The Profound and Intimate Power of the Obergefell Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 5 (2016) ("The language of the opinion sheds new light on constitutional interpretation and can be used to advance the civil rights of gays beyond the context of marriage.").

3. Anthony O'Rourke, *Substantive Due Process for Noncitizens: Lessons from Obergefell*, 114 MICH. L. REV. FIRST IMPRESSIONS 9, 9 (2015) ("The outcome of the case was a foregone conclusion after the Court, in *United States v. Windsor*, signaled its views regarding the constitutional importance of same-sex marriage rights."); Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 428 (2016) ("By the time *Obergefell* made its way to the Supreme Court, many courts and legal commentators believed that *Windsor* mandated a finding that there was a constitutional right for gays and lesbians to marry.").

appealed.⁴ Yet, the circuit courts were far from unanimous when explaining why those bans violated constitutional guarantees,⁵ and the Court finally granting certiorari provided reason to hope that the Court would add some clarity to the implicated issues.⁶ While the *Obergefell* opinion did resolve some issues, it raised many more questions than it answered and is more likely to undermine rather than promote consensus among the circuits about the proper way to approach due process issues.

A. Which Relationships Have Constitutional Significance?

The *Obergefell* opinion focused on the importance of marriage, describing it as having “transcendent importance”⁷ and as an institution that “always has promised nobility and dignity to all persons, without regard to their station in life.”⁸ Marriage is not only “sacred to those who live by their religions . . . [but] offers unique fulfillment to those who find meaning in the secular realm.”⁹ Marriage “is essential to our most profound hopes and aspirations,”¹⁰ is “central[] . . . to the human condition,”¹¹ and provides a variety of benefits, because “through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality . . . [which] is true for all persons, whatever their sexual orientation.”¹² Further, “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”¹³

Some of the *Obergefell* Court’s discussion of marriage is reminiscent of the Court’s discussion of the same topic in *Griswold v. Connecticut*:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of

4. *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931 (2015), and *cert. denied sub nom.* *Idaho v. Latta*, 135 S. Ct. 2931 (2015), and *cert. dismissed sub nom.* *Coal. for the Prot. of Marriage v. Sevcik*, 136 S. Ct. 13 (2015); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied sub nom.* *Rainey v. Bostic*, 135 S. Ct. 286 (2014), and *cert. denied*, 135 S. Ct. 308 (2014), and *cert. denied sub nom.* *McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014), and *cert. denied sub nom.* *Walker v. Wolf*, 135 S. Ct. 316 (2014).

5. Compare *Baskin*, 766 F.3d at 665 (striking down same-sex marriage ban on rational basis grounds as a violation of equal protection guarantees), with *Bostic*, 760 F.3d at 367 (striking down same-sex marriage ban as a violation of the fundamental right to marry).

6. Cf. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2013-2014: Same-Sex Couples Attain Rights to Marry and Parent*, 48 FAM. L.Q. 609–10 (2015).

The Tenth Circuit Court of Appeals led the way by upholding a lower district court decision finding Utah’s constitutional ban on same-sex marriage unconstitutional on substantive due process grounds. Four other circuits followed striking same-sex marriage bans for a variety of reasons . . . By next year’s article, the same-sex marriage issue will be resolved.

7. *Obergefell*, 135 S. Ct. at 2594.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Obergefell*, 135 S. Ct. at 2599 (citing *United States v. Windsor*, 133 S. Ct. 2675, 2693–95 (2013)).

13. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁴

Yet, *Griswold's* discussion of marriage occurred prior to the Court's recognition in *Loving v. Virginia* that marriage was protected by the Due Process Clause of the Fourteenth Amendment.¹⁵ Post-*Loving*, one might have expected the Court to simply explain that the right to marry is protected by substantive due process guarantees and, possibly, that the right to marry includes the right to marry someone of the same sex.

It is not as if the *Obergefell* Court failed to make these points. On the contrary, in addition to waxing eloquent about the importance of marriage, the Court also noted that the right to marry is a fundamental right¹⁶ and that same-sex couples may exercise that right.¹⁷ Thus, the Court both said what was necessary to avoid having to talk about the importance of marriage and nonetheless made clear that marriage occupies a special position in the Constitution's hierarchy of values. The Court's extended discussion of marriage made some commentators wonder whether the Court was implicitly if not explicitly suggesting that those in non-marital relationships were not deserving of respect.¹⁸

Before reaching the conclusion that the *Obergefell* Court was signaling that marriage is the only relationship protected by the Constitution, one should consider a different post-*Loving* marriage decision.¹⁹ In *Zablocki v. Redhail*, which was issued after *Loving*,²⁰ the Court described "marriage as 'the most important relation in life'"²¹ and "as 'the foundation of the family and of society, without which there would be neither civilization nor progress.'"²² Yet, some commentators read *Zablocki* as providing the basis for protecting non-marital

14. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

15. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

16. *Obergefell*, 135 S. Ct. at 2589 ("[T]he right to marry is fundamental.").

17. *Id.* at 2599 ("[S]ame-sex couples may exercise the right to marry.").

18. See Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 127 (2015) ("*Obergefell* . . . valorizes marriage *qua* marriage, imbuing the status with ephemeral qualities such as dignity and profundity, and shaming those who do not participate."); Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 CAL. L. REV. CIR. 117, 123 (2015) ("*Obergefell* . . . cares little about the indignity of those benefits being tied to marital status, and the right to dignity of unmarried families."); Nancy E. Dowd, *Bridging the Work/Family Divide: Implications of A Broader Sex Discrimination Analysis for Men's Work/Family Issues*, 67 FLA. L. REV. F. 122, 123 (2016) ("*Obergefell's* exaltation of marriage and potential conservatism might undermine recognition and support of non-marital families, a disturbing possibility in light of the patterns of family difference and diversity, and the patterns of marriage.").

19. Cf. Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 HOW. L.J. 75, 87 (2007) (noting that "[t]he *Zablocki* Court was unstinting in its praise of marriage").

20. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) ("The leading decision of this Court on the right to marry is *Loving*.").

21. *Id.* at 384 (citing *Maynard v. Hill*, 125 U.S. 190, 205 (1888)).

22. *Id.* (citing *Maynard*, 125 U.S. at 211).

associations rather than as privileging marriage over other kinds of relationships.²³ Thus, *Zablocki* at least suggests the possibility that the *Obergefell* Court's extolling the virtues of marriage need not undermine the values of other types of relationships.²⁴

Zablocki is useful to consider for yet another reason, because it may offer a clue as to why the *Obergefell* Court praised marriage so effusively. At issue in *Zablocki* was a Wisconsin statute that precluded noncustodial parents from marrying if they had an existing child support obligation that they were unable to pay.²⁵ The *Loving* Court had suggested that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"²⁶ and that "deny[ing] this fundamental freedom on so unsupportable a basis as [a] racial classification . . . is surely to deprive all the State's citizens of liberty without due process of law."²⁷ But *Zablocki* did not involve a racial classification, and there was some question whether *Loving* would provide the basis for protecting the right to marry when issues of race were not implicated.²⁸

Most of the *Loving* opinion involved why Virginia's interracial marriage ban violated federal equal protection guarantees,²⁹ and the Virginia law could have been struck down on equal protection grounds alone.³⁰ In contrast, the equal protection classification at issue in *Zablocki* involved economic status rather than race,³¹ and the Court had already held that indigency was not a suspect classification.³² Because poverty did not trigger closer scrutiny, the Court's

23. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 671 (1980) ("Properly understood, *Zablocki* implies a thoroughgoing reassessment of the constitutionality of a wide range of state laws limiting the right to marry and restricting other nonmarital forms of intimate association.").

24. Regrettably, some commentators characterizing *Obergefell* as "shaming those who do not participate" in marriage fail to consider the implications of *Zablocki* when offering this interpretation of *Obergefell*. See, e.g., Carpenter & Cohen, *supra* note 18, at 127.

25. *Zablocki*, 434 U.S. at 375.

26. *Loving*, 388 U.S. at 12.

27. *Id.*

28. Cf. John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 HOW. L.J. 15, 25 (2007) ("*Zablocki*, moreover, made clear that the Court's unwillingness to tolerate certain marriage restrictions was not limited to those drawn on the basis of race.").

29. Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the "Equalerty" of the Substantive Due Process Clause*, 12 J. L. & SOC. CHALLENGES 220, 264 (2010) (describing "*Loving* [as] primarily being an equal protection opinion"); Mark Strasser, *Windsor and Its Progeny*, 13 AVE MARIA L. REV. 181, 190 (2015) ("While *Loving* establishes the fundamental right to marry, most of that opinion was focused on the equal protection aspect of the interracial marriage ban.").

30. Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 84 (2006) ("The language about legal-marriage being a fundamental right in *Loving* was completely unnecessary to the holding of the case; equal protection doctrine alone required the *Loving* outcome.").

31. See *Zablocki*, 434 U.S. at 387 ("Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges.").

32. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (rejecting that poverty is a suspect classification); see also Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 726 (2008)

employing a tougher standard of review would be dependent upon the nature of the interest affected rather than the class targeted.³³

The constitutionality of the statute at issue was a closer call in *Zablocki* than *Loving* for an additional reason. While the *Loving* Court rejected that the state had a legitimate interest in prohibiting racial intermarriage,³⁴ the *Zablocki* Court recognized that the state had legitimate if not important interests in preventing a noncustodial parent with support obligations from marrying someone other than the custodial parent if that noncustodial parent was unable to pay the court-ordered child support already owed.³⁵ Had the Court employed rational basis review, the Wisconsin statute would likely have been upheld.³⁶ By emphasizing the importance of the individual interest at stake,³⁷ the *Zablocki* Court emphasized how much was lost by precluding the marriage at issue. So, too, the *Obergefell* Court's paean to marriage³⁸ may not simply have been a "rhetorical flourish"³⁹ but, instead, an attempt to suggest how much is lost by individuals who have arbitrarily been denied the right to marry.⁴⁰ The Court noted that marriage has the same import for same-sex couples as it does for different sex couples,⁴¹ so the denial would impose a variety of opportunity costs in addition to the stigma of being prohibited from marrying.⁴²

While the *Obergefell* Court may have been extolling marriage to illustrate the severity of the burden imposed on same-sex couples who are precluded from marrying, the Court may have had other purposes in mind. Demographic trends reflect that more and more couples are choosing to live together without benefit of

("[I]f the case [*Zablocki*] truly were only an equal protection case, rational basis review would have applied because wealth is not a suspect classification.").

33. Cf. Chris Bower, *Juggling Rights and Utility: A Legal and Philosophical Framework for Analyzing Same-Sex Marriage in the Wake of United States v. Windsor*, 102 CAL. L. REV. 971, 974 (2014) ("Under the traditional tiers-of-scrutiny framework, a government action that treats a suspect class unequally or infringes on a fundamental right can be justified whenever the violation is narrowly tailored to achieve a compelling government interest.").

34. *Loving*, 388 U.S. at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.").

35. *Zablocki*, 434 U.S. at 388 ("We may accept for present purposes that these are legitimate and substantial interests.").

36. See Rush, *supra* note 32, at 726 ("[U]nder rational basis review, the law [at issue in *Zablocki*] might have been upheld.").

37. *Zablocki*, 434 U.S. at 383.

38. *Carpenter & Cohen*, *supra* note 18, at 125 ("*Obergefell* is largely a lengthy paean to traditional marriage.").

39. *New York v. United States*, 505 U.S. 144, 162 (1992).

40. But see *Carpenter & Cohen*, *supra* note 18, at 129 ("By framing the opinion as a love letter to marriage itself, the Court has moved beyond an equal access rationale and toward an implicit determination that marriage is so critical that states are constitutionally required to offer that institution as the enduring and unique way to recognize relationships.").

41. See *Obergefell* 135 S. Ct. at 2601.

42. *Id.* at 2602 ("[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.").

marriage.⁴³ Perhaps the Court was trying to urge more couples to marry⁴⁴ or was even endorsing the view that unmarried individuals should not enjoy the same status as those who are married.⁴⁵ Some commentators worry that *Obergefell* bodes poorly for the treatment of non-marital couples.⁴⁶

Obergefell need not be read to privilege marital over non-marital relationships⁴⁷ and, instead, might be read to offer implicit support for the dignity of non-marital relationships.⁴⁸ To see why, one should read both the *Lawrence* opinion and what the *Obergefell* Court said about that opinion.⁴⁹

43. See Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401, 1448 (2015) (noting that “for an increasing number of people cohabitation has replaced marriage”); Raymond C. O’Brien, *Family Law’s Challenge to Religious Liberty*, 35 U. ARK. LITTLE ROCK L. REV. 3, 8 (2012) (noting that an “increasing number of couples choose to enter into nonmarital cohabitation rather than marry at all”); Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statutes in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 45, 61 (2014) (“With marriage in decline, cohabitation on the rise, and the number of children born to cohabiting couples increasing at a rapid pace, there is ample reason to rethink marriage as the sole intimate adult relationship upon which legal rights and protections are granted.”).

44. *But see* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 31 (2015) (“To penalize individuals for living either alone or in intimate nonmarital arrangements in the name of honoring and encouraging marriage is akin to denying same-sex couples the right to marry in the name of honoring and encouraging marriage by opposite-sex couples—a justification that Justice Kennedy’s *Obergefell* opinion rightly repudiated.”).

45. See *Carpenter & Cohen*, *supra* note 18, at 127 (“*Obergefell* does not merely stress the importance of marriage as the only currently existing gatekeeper for other benefits and rights; rather, it valorizes marriage *qua* marriage, imbuing the status with ephemeral qualities such as dignity and profundity, and shaming those who do not participate.”).

46. Cf. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1249–50 (2016) (“The Court envisions nonmarital life, including nonmarital childrearing, as inferior.”). See *Carpenter & Cohen*, *supra* note 18, at 127 (“According to the Court, people wishing to become their best selves and to live a life free from loneliness must follow the most traditional of all paths: find a life-long companion to the exclusion of all others and then get hitched. Any other way that an individual might seek fulfillment and happiness is inferior.”); Ruth Colker, *The Freedom to Choose to Marry*, 30 COLUM. J. GENDER & L. 383, 389 (2016) (“The *Obergefell* Court’s emphasis on the importance of children being raised by married parents reflects the historical stigma against nonmarital parents and their children.”).

47. See Courtney G. Joslin, *Marriage Equality and Its Relationship to Family Law*, 129 HARV. L. REV. F. 197, 198 (2016) (“I posit an even more radical proposition: I argue that marriage equality might open up progressive possibilities not just for nonmarital children, but also for nonmarital *adult* relationships.”).

48. See *infra* notes 50–91 and accompanying text.

49. See *infra* notes 50–75 and accompanying text.

In *Lawrence v. Texas*,⁵⁰ the Court struck down on due process grounds⁵¹ a Texas law criminalizing same-sex relations.⁵² While the Court held that the “right to liberty under the Due Process Clause gives . . . [same-sex couples] the full right to engage in their conduct without intervention of the government,”⁵³ the Court never described the implicated interest as a fundamental right⁵⁴ but instead simply suggested that the interest was constitutionally protected.⁵⁵ That said, however, the Court also did not describe the right to engage in non-marital relations as a mere liberty interest, instead leaving the proper characterization of the interest an open question.⁵⁶

That open question was answered when the *Obergefell* Court explained that “*Bowers* upheld state action that denied gays and lesbians a *fundamental* right and caused them pain and humiliation”⁵⁷ and that “*Bowers* was eventually repudiated in *Lawrence*.”⁵⁸ The Court’s describing *Bowers* as denying a fundamental right and

50. 539 U.S. 558 (2003).

51. *Id.* at 564 (“[T]he case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”); *id.* at 567 (“[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

52. *Id.* at 562 (“The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”).

53. *Id.* at 578.

54. *See id.* at 586 (Scalia, J., dissenting) (“[N]owhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause.”); Austin Raynor, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1079 (2013) (“The opinion’s refusal to designate the infringed liberty interest as ‘fundamental’ also significantly distances its holding from the privacy cases, all of which depend upon such a classification.”).

55. *See* Donald H. J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, 49 IND. L. REV. 367, 369 (2016) (“[I]n *Lawrence v. Texas*, the second sodomy case, the Court reasoned that the case involved a liberty interest (the Court did not use the term fundamental right) to engage in sexual intimacy and whether homosexuals can be denied that right.”). *See also Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (“[T]he Court simply describes petitioners’ conduct as ‘an exercise of their liberty’—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.”); Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 47 (2012) (“In *Lawrence v. Texas*, the Court did not explicitly establish that a fundamental right to privacy existed in all intimate relationships, but it did invoke a standard beyond mere minimal scrutiny.”).

56. *See* Mark Strasser, *Marriage, the Constitution, and the Future of Family Law*, 21 WASH. & LEE J. CIV. RTS. & SOC. JUST. 303, 304 (2015) (“While the Court in both cases [*Windsor* and *Lawrence*] struck down laws disadvantaging same-sex couples, the analyses offered neither specified the level of scrutiny employed nor whether the rights at issue were fundamental rather than mere liberty interests.”); Daniel J. Crooks III, *Toward “Liberty”: How the Marriage of Substantive Due Process and Equal Protection in Lawrence and Windsor Sets the Stage for the Inevitable Loving of Our Time*, 8 CHARLESTON L. REV. 223, 256 (2014) (“There is no discussion of privacy in the majority’s opinion, no mention of a particular fundamental right, and not so much as a whisper of whether the Texas law in question was entitled to deference of any sort.”).

57. *Obergefell*, 135 S. Ct. at 2606 (emphasis added).

58. *Id.*

then noting that the decision had been overruled suggests that the right at issue—the right to engage in adult, consensual, non-marital relations⁵⁹—was not a mere liberty interest but was instead itself fundamental.⁶⁰

Even if the right to engage in voluntary, adult, intimate relations is fundamental, a separate issue involves how broadly that right should be construed. The *Obergefell* Court explained that *Lawrence* stood for more than the proposition that those engaging in adult, consensual relations were immunized from criminal prosecution. “But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”⁶¹

What would the full promise of liberty include? That question is difficult to answer, at least in part, because *Lawrence* involved issues of equality of treatment as well as intimate association. The Court might have been suggesting that individuals should not be treated differently because they engage in same-sex rather than different-sex relations.⁶² But then a separate question would be whether non-marital relations as a general matter were protected.⁶³

The *Obergefell* Court explained that under *Lawrence* both same-sex and different-sex couples have the right to engage in intimate relations,⁶⁴ assuming that those relations are voluntary, non-commercial, and between adults.⁶⁵ Even after announcing that the right to intimate association was a fundamental right, the *Obergefell* Court suggested that it is error to believe that the “freedom stops there,”⁶⁶ which leaves open what else that freedom might include.

The *Lawrence* Court may have shed some light on what in addition that freedom includes when noting that “adults may choose to enter upon . . . [a sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”⁶⁷ As an initial matter, the Court’s comment should not be interpreted as merely indicating that individuals do not lose their dignity simply because they have non-marital relationships.⁶⁸ The *Lawrence* Court

59. See *Lawrence*, 539 U.S. at 578.

60. Peter Nicolas, *Fundamental Rights in A Post-Obergefell World*, 27 YALE J.L. & FEMINISM 331, 340 (2016) (“*Obergefell* rather clearly describes *Lawrence* as falling within the Court’s line of cases recognizing a fundamental right to ‘intimate association.’”).

61. *Obergefell*, 135 S. Ct. at 2600.

62. Cf. *Lawrence*, 539 U.S. at 574 (“As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument . . .”).

63. Cf. *id.* at 575 (“Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”).

64. *Obergefell*, 135 S. Ct. at 2600 (“As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association.”).

65. *Lawrence*, 539 U.S. at 578 (“The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”).

66. *Obergefell*, 135 S. Ct. at 2600.

67. *Lawrence*, 539 U.S. at 567.

68. See *Unfixing Lawrence*, 118 HARV. L. REV. 2858, 2868 (2005) (“The opinion thus limited the

said much more: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."⁶⁹ In making such a point, the Court strongly implied that the enduring, personal, *non-marital* bond itself has value.⁷⁰

The recognition that intimate non-marital relationships have value does not establish that states must accord formal recognition to those relationships, and the Court expressly refused to address that question. "The statutes do seek to control a personal relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of persons to choose without being punished as criminals."⁷¹ The Court reiterated its point later in the opinion—" [The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."⁷²

When expressly refusing to address whether federal constitutional guarantees protect same-sex marriage, the Court may simply have been noting that the issue of same-sex marriage was not before the Court.⁷³ Or, the Court may have been undecided about whether same-sex marriage is protected by federal constitutional guarantees.⁷⁴ The focus here, though, is a little different. If one reads *Lawrence* through an *Obergefell* lens, one sees *Lawrence* as holding that same-sex and different-sex non-marital relationships are equivalent for constitutional purposes⁷⁵ and that such relationships have value of which the Constitution takes account.⁷⁶

scope of the privacy right only to the 'confines of [the] home[.]' and it implied that dignity does not inhere in the relationship but instead waits at the threshold to be assumed again upon the individual's departure.").

69. *Lawrence*, 539 U.S. at 567.

70. Mark Strasser, *Same-Sex Marriage and the Right to Privacy*, 13 J.L. & FAM. STUD. 117, 128 (2011) ("[T]he [*Lawrence*] Court went out of its way to explain that when 'sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring[.] . . . suggest[ing] that the relationship itself has value independent of the sexual relations.'").

71. *Lawrence*, 539 U.S. at 567 (emphasis added)

72. *Id.* at 578.

73. Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. CIVIL RIGHTS. & CIVIL L. 1, 3 n.1 (2007) ("*Lawrence* did not raise the question of marriage equality.") In *McLaughlin v. Florida*, 379 U.S. 184 (1964), the Court struck down Florida's punishing interracial fornication and adultery more severely than intra-racial fornication and adultery, expressly refraining from addressing the constitutionality of the state's interracial marriage ban. *See id.* at 196 ("We accordingly invalidate s 798.05 without expressing any views about the State's prohibition of interracial marriage . . .").

74. Kenneth P. Miller, *The California Supreme Court and the Popular Will*, 19 CHAP. L. REV. 151, 188 (2016) ("[S]trategists for the gay rights movement believed that the Court [at the time *Lawrence* was issued] was not yet prepared to issue a broad decision granting same-sex couples federal constitutional marriage rights. . . ."). *But see Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.").

75. *Obergefell*, 135 S. Ct. at 2600 ("As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association.").

76. *See Lawrence*, 539 U.S. at 567.

Does this constitutionally recognized value translate into a requirement that states accord to cohabiting couples some or all of the rights enjoyed by married couples?⁷⁷ Certainly, states are permitted to accord non-marital couples and their families certain benefits and obligations.⁷⁸ But states being permitted to do so is not equivalent to their being required to do so, and whether states are required by the Federal Constitution to do so might depend at least in part upon whether those in intimate non-marital relationships enjoy any rights beyond immunity from criminal prosecution.

There is room for disagreement about whether the *Obergefell* Court viewed non-marital relationships as having positive value. Admittedly, the Court made some negative comments about non-marital relationships, for example, describing one of the couples seeking marriage as “seek[ing] relief from the continuing uncertainty their unmarried status creates in their lives.”⁷⁹ Much of that couple’s insecurity was due to Michigan’s refusal to permit second-parent adoption, which meant that each of the children raised by the couple was only recognized as having one legal parent.⁸⁰ If the legal parent died, the relationship of the partner (i.e., the non-legal parent) with the child would be at risk.⁸¹ Yet, that instability and insecurity would not have been present if Michigan had recognized second-parent adoptions,⁸² which suggests that marriage is not the only route to establishing secure parent-child relations between children and the adults who are raising them.

The *Obergefell* Court implied that children raised in non-marital households “suffer the stigma of knowing their families are somehow lesser”⁸³ and, further, “suffer the significant material costs of being raised by unmarried parents,

77. Cf. Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CAL. L. REV. CIR. 126, 135 (2015) (“*Obergefell* might come to stand for the core principle that due process and equal protection forbid exclusionary laws that demean and reinforce the subordinate status of historically marginalized groups. Theoretically, at least, this principle would apply not only to other discrimination based on sexual orientation, but also to laws that exclude nonmarried individuals and families from obtaining the benefits available to the married.”).

78. See Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 590 (2013) (“[Washington courts] have advanced the doctrine of ‘committed intimate relationships’ . . . in which the court looks at the couple’s conduct during their relationship to see if the relationship demonstrates a marriage-like pattern. If the court finds that it does, the couple is treated similarly to married couples with regard to property distribution. . . .”).

79. *Obergefell*, 135 S. Ct. at 2595.

80. See *id.* (“Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent.”); see also Ginger Grimes, *Masking the Reemergence of Immutability with “Outcomes for Children,”* 5 UC IRVINE L. REV. 683, 693 (2015) (“Michigan law prohibited all unmarried couples from jointly adopting children and thus prevented April and Jayne from both being legal parents to their three children on the basis of their marital status. Michigan law also prevented same-sex couples from getting married. Together, these laws operated to ban all same-sex couples from jointly adopting children.”).

81. See *Obergefell*, 135 S. Ct. at 2595 (“[W]here tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt.”).

82. Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J.L. & PUB. POL’Y 1, 22 (2015) (“The second-parent adoption allows a nonspouse to adopt a child without terminating the parental rights of the biological co-parent.”).

83. *Obergefell*, 135 S. Ct. at 2600.

relegated through no fault of their own to a more difficult and uncertain family life.”⁸⁴ But the Court was not entirely clear about why those families are allegedly lesser. The stigma might be due to the state’s prohibiting the couple from marrying rather than to the parents choosing not to marry.⁸⁵ If that is the correct interpretation, then children would not be stigmatized merely because their parents had rejected the option of marrying. Further, when discussing the material costs associated with being raised by unmarried parents, the Court may have had in mind some of those discussed in *United States v. Windsor*,⁸⁶ for example, the extra healthcare costs associated with providing coverage for non-marital partners.⁸⁷ While some families might well have to pay those costs, others would not if both of the adults were covered by insurance provided by their respective employers.⁸⁸

It is simply unclear whether *Obergefell* should be understood as reifying the difference between marital and non-marital relationships.⁸⁹ *Obergefell* did cite with approval the *Lawrence* language praising “a personal [non-marital] bond that is more enduring,”⁹⁰ so the resolution of how to value non-marital relationships will have to await future opinions.⁹¹ A separate issue will be whether lower courts read *Obergefell* as promoting or at least condoning adverse treatment of those in non-marital relationships, *Lawrence*’s celebration of the value of intimate non-marital relationships notwithstanding.⁹² Thus, even if the Court did not intend to communicate that the Constitution stigmatizes those in non-marital relationships, lower courts might nonetheless infer that the Constitution either devalues or

84. *Id.*; see also Colker, *supra* note 46, at 417 (“The *Obergefell* Court recognizes the harms that flow to the children of unmarried parents—both material and attitudinal.”); NeJaime, *supra* note 46, at 1249–50 (“The Court envisions nonmarital life, including nonmarital childrearing, as inferior.”).

85. *Cf.* *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (suggesting that the federal government’s refusal to recognize same-sex marriages valid in the states would humiliate the married, same-sex couples’ children because “[t]he law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”).

86. *Id.* at 2695.

87. *See id.* (“DOMA . . . raises the cost of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses.”) (citing 26 U.S.C. § 106; Treas. Reg. § 1.106–1, 26 CFR § 1.106–1 (2012); IRS Private Letter Ruling 9850011 (Sept. 10, 1998)).

88. *Cf.* Kerry Hannon, *Employers Penalizing Spouses for Health Insurance*, NEXTAVENUE (Apr. 23, 2013), <http://www.nextavenue.org/employers-penalizing-spouses-health-insurance/> (“If you’re currently on your husband’s policy but work full-time for an employer that offers health benefits, check with your human resources department for details on enrolling. You might find that your employer provides a larger subsidy.”).

89. *See* Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23, 23 (2015) (suggesting that *Obergefell* “reifies marriage as a key element in the social front of family, further marginalizing nonmarital families”).

90. *Obergefell*, 135 S. Ct. at 2600 (citing *Lawrence*, 539 U.S. at 567).

91. *Cf.* Tribe, *supra* note 44, at 28 (“But in *Obergefell*, the lesson went further, teaching that the deeper purposes of neither equal protection nor due process could be satisfied if only *negative* liberty—the liberty ‘to engage in intimate association without criminal liability’—was entitled to constitutional protection.”).

92. Colker, *supra* note 46, at 406 (“One must wonder if the stigma against nonmarital parents and their children will increase as a new group is allowed to enter the institution of marriage, because couples can no longer offer as an excuse that the state would not permit them to marry.”).

permits states to devalue such relationships.⁹³ Such an interpretation might have important implications in states with constitutional amendments that preclude according the benefits of marriage to those in non-marital relationships, especially if those prohibitions are construed broadly.⁹⁴

B. *Glucksberg* and the Right to Marry

While *Obergefell* is important because it struck down same-sex marriage bans, it also may turn out to be very important because of how it treats *Washington v. Glucksberg*.⁹⁵ *Glucksberg* involved a challenge to a Washington assisted-suicide prohibition.⁹⁶ The plaintiffs were doctors who, but for the law, would have provided assistance to terminally ill patients who wished to end their lives.⁹⁷

The *Glucksberg* Court began its due process analysis “by examining our Nation’s history, legal traditions, and practices,”⁹⁸ noting a long history of criminalizing suicide and the assistance of suicide.⁹⁹ The Court announced that its “established method of substantive-due-process analysis has two primary features.”¹⁰⁰ The first was that “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’”¹⁰¹ and the second was that “in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest”¹⁰² is necessary. The Court then noted some of the rights that had already been recognized: the right to marry,¹⁰³ the right to procreation,¹⁰⁴ the right to direct the education of upbringing of one’s children,¹⁰⁵ the right to use contraception whether within marriage¹⁰⁶ or outside of it,¹⁰⁷ and the right to abortion.¹⁰⁸

93. Cf. *Carpenter & Cohen*, *supra* note 18, at 125 (discussing *Obergefell*’s “disturbing denigration of those who are not married”).

94. Cf. Mark Strasser, *The Right to Marry and State Marriage Amendments: Implications for Future Families*, 45 STETSON L. REV. 309, 315–33 (2016) (discussing the constraints imposed by such state constitutional amendments).

95. 521 U.S. 702 (1997).

96. *Id.* at 705–06 (“The question presented in this case is whether Washington’s prohibition against ‘caus[ing]’ or ‘aid[ing]’ a suicide offends the Fourteenth Amendment to the United States Constitution.”).

97. *Id.* at 707 (“These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients in ending their lives if not for Washington’s assisted-suicide ban.”).

98. *Id.* at 710 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849–50 (1992)).

99. *Id.* at 711–18.

100. *Id.* at 720.

101. *Glucksberg*, 521 U.S. at 720–21 (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

102. *Id.* at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

103. *Id.* at 720 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

104. *Id.* (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 545 (1942)).

105. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) and *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925)).

106. *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965)).

107. *Glucksberg*, 521 U.S. at 720 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 472 (1972)).

108. *Id.* (citing *Planned Parenthood of Se. Pa.*, 505 U.S. at 839–40 (1992)).

The *Glucksberg* Court neglected to mention that its recommended due process approach would not have protected all of the interests that it described as fundamental.¹⁰⁹ For example, in *Griswold v. Connecticut* in which the Court struck down a Connecticut law denying marital couples access to contraception,¹¹⁰ Justice Stewart noted in dissent that the Connecticut law had been on the books for over eighty years.¹¹¹ So, too, consider *Loving v. Virginia* in which the Court struck down Virginia's interracial marriage ban.¹¹² Virginia had laws banning interracial marriage while it was still a colony.¹¹³ In *Eisenstadt v. Baird*, the Court struck down a Massachusetts law that had been on the books in some form for over 90 years.¹¹⁴ In *Roe v. Wade*, the Court struck down an abortion law that had been in existence for almost 120 years,¹¹⁵ a fact emphasized by then-Justice Rehnquist in his dissent.¹¹⁶ If these laws had been on the books for decades, then it could hardly be said that protection of the rights at issue was deeply rooted in the Nation's history and traditions. But this means that the substantive due process approach described by Chief Justice Rehnquist in the majority opinion in *Glucksberg*¹¹⁷ was the approach *not* used in the very cases in which many of the fundamental rights were recognized. Had the Court employed the *Glucksberg* approach in those earlier cases, it would likely have reached much different conclusions, as then-Justice Rehnquist's *Roe* dissent illustrates.¹¹⁸ Further, the *Glucksberg* approach is

109. Strasser, *supra* note 19, at 112–13 (“[T]he history and tradition test is inappropriate to determine fundamental rights because its use would mean, for example, that the right to have access to contraception or abortions are also not fundamental rights. . .”).

110. See *Griswold*, 381 U.S. at 480

The statutes whose constitutionality is involved in this appeal are ss 53–32 and 54–196 of the General Statutes of Connecticut (1958 rev.). The former provides:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Section 54–196 provides:

Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

111. See *id.* at 527 (Stewart, J., dissenting) (“Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone.”).

112. *Loving*, 388 U.S. at 12 (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

113. See Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968 (1989) (“Virginia was . . . one of the first colonies to formulate a legal definition of race and to enact prohibitions against interracial marriage and interracial sex.”).

114. See *Eisenstadt*, 405 U.S. at 447 (“Section 21 stems from Mass. Stat.1879, c. 159, s 1, which prohibited without exception, distribution of articles intended to be used as contraceptives.”).

115. See *Roe v. Wade*, 410 U.S. 113, 166 (1973).

116. See *id.* at 176–77 (Rehnquist, J., dissenting) (“[T]he Texas statute struck down today was, as the majority notes, first enacted in 1857 and ‘has remained substantially unchanged to the present time.’”).

117. See *Glucksberg*, 521 U.S. at 705 (“Chief Justice Rehnquist delivered the opinion of the Court.”).

118. See *supra* note 116 and accompanying text.

incompatible with a later decision—*Lawrence*— where that decision recognizes a fundamental right to engage in non-marital relations.¹¹⁹

While *Glucksberg* does not provide a principle that plausibly accounts for those interests that have been recognized as fundamental rights, a separate question is whether *Obergefell* required overruling *Glucksberg* or, at least, severely limiting its reach.¹²⁰ The *Obergefell* Court noted “*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices.”¹²¹ But, the *Obergefell* Court explained, “*Loving* did not ask about a ‘right to interracial marriage’ . . . and *Zablocki* did not ask about a ‘right of fathers with unpaid child support duties to marry.’”¹²² Instead, in each case the Court considered whether “there was a sufficient justification for excluding the relevant class from the right.”¹²³

One way to accommodate *Glucksberg* while still striking down same-sex marriage bans would be to suggest that the *Glucksberg* analysis is only triggered if the recognition of new rather than existing rights is involved.¹²⁴ Because the right to marry had already been recognized prior to *Glucksberg*, *Glucksberg*’s analysis would be inapplicable when deciding whether the already-recognized right to marry included the right to marry a same-sex partner.¹²⁵

The *Obergefell* Court did not simply reject the applicability of *Glucksberg* because the right to marry had already been recognized as a fundamental right. Rather, although recognizing that “[t]he right to marry is fundamental as a matter of history and tradition,”¹²⁶ the Court also suggested that “rights come not from ancient sources alone.”¹²⁷ Such an approach, while not overruling *Glucksberg*, nonetheless severely limited its reach—“while that approach [in *Glucksberg*] may have been appropriate for the asserted right there involved (physician-assisted

119. See *Lawrence*, 539 U.S. at 593–94 (Scalia, J., dissenting) (noting that *Glucksberg* was incompatible with a holding that the right to engage in non-marital relations is fundamental). But the *Obergefell* Court suggested that the right to engage in such relations was indeed fundamental. See *Obergefell*, 135 S. Ct. at 2606.

120. Chief Justice Roberts wrongly suggests that the two decisions were incompatible. See *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (“It is revealing that the majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process.”).

121. *Obergefell*, 135 S. Ct. at 2602.

122. *Id.*

123. *Id.*

124. See *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014), *cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286 (2014), and *cert. denied*, 135 S. Ct. 308 (2014), and *cert. denied sub nom. McQuigg v. Bostic*, 135 S. Ct. 314 (2014) (“*Glucksberg*’s analysis applies only when courts consider whether to recognize new fundamental rights.”).

125. *Id.* (“Because we conclude that the fundamental right to marry encompasses the right to same-sex marriage, *Glucksberg*’s analysis is inapplicable here.”); see also Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 163–64 (2015) (“*Obergefell* presented the Court with an escape hatch that would have allowed it to leave the *Glucksberg* view of tradition intact.”).

126. *Obergefell*, 135 S. Ct. at 2602.

127. *Id.*

suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."¹²⁸

The *Obergefell* Court made explicit what should have been clear upon a brief examination of those interests recognized as fundamental¹²⁹—the *Glucksberg* history and tradition test does not plausibly account for those rights recognized as fundamental. Yet, the history and tradition test has been cited as a reason not to recognize particular interests as fundamental,¹³⁰ and after *Obergefell* the Court *may* have to provide a different rationale when rejecting that a particular interest qualifies as a fundamental right.¹³¹ Before that standard is discussed, however,¹³² a different point might be made. It would be unsurprising for members of the Court sometime in the future to claim that the right to marry has long been recognized as a fundamental right as a matter of history and tradition,¹³³ and that the Court's severe limitation of *Glucksberg*¹³⁴ was mere dictum and not entitled to precedential weight.¹³⁵ As to how many justices will assert that position, this may depend upon who is nominated and confirmed to occupy any open seats on the Court.¹³⁶

C. The Judicial Role

Courts following *Obergefell* and employing the *Glucksberg* approach only when physician-assisted suicide is at issue will need to know what approach to employ when other kinds of interests are alleged to be protected by substantive due process guarantees.¹³⁷ The Court engaged in a brief discussion of the role of

128. *Id.*

129. See *supra* notes 109–18 and accompanying text.

130. See, e.g., *Kerry v. Din*, 135 S. Ct. 2128, 2134 (2015) (“[B]efore conferring constitutional status upon a previously unrecognized ‘liberty,’ we have required ‘a careful description of the asserted fundamental liberty interest,’ as well as a demonstration that the interest is ‘objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.’”) (citing *Glucksberg*, 521 U.S. at 720–21).

131. But see *infra* text following this note.

132. See *infra* notes 137–45 and accompanying text.

133. See *supra* note 126 and accompanying text.

134. See *supra* note 128 and accompanying text.

135. See *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 296 (1995) (Scalia, J., dissenting) (“We accord no precedential weight to mere dicta.”).

136. David Garrow, Op-Ed, *Four Supreme Court Justices are older than 75. Is that a problem?* L.A. TIMES (Feb. 2, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-0202-garrow-aging-judiciary-20160202-story.html> (“Today we have four Supreme Court justices who are superannuated: Stephen G. Breyer is 77, Anthony M. Kennedy will turn 80 this summer, Antonin Scalia will celebrate his 80th birthday on March 11, and Ruth Bader Ginsburg will celebrate her 83rd four days later. Both Clarence Thomas, 67, and Samuel A. Alito Jr., 65, also qualify for Social Security.”). Justice Scalia died within two weeks of the publication of that op ed. See also Jamie Gangel, Ariane de Vogue, Evan Perez & Kevin Bohn, *Antonin Scalia, Supreme Court justice, dies at 79*, CNN POLITICS (Feb. 15, 2016), <http://www.cnn.com/2016/02/13/politics/supreme-court-justice-antonin-scalia-dies-at-79/index.html> (“U.S. Supreme Court Justice Antonin Scalia, the leading conservative voice on the high court, has died at the age of 79, a government source and a family friend told CNN on Saturday.”).

137. Some commentators seem not to appreciate how *Obergefell* attempted to cabin *Glucksberg*'s reach. See O'Rourke, *supra* note 3, at 16 (“*Obergefell* thus opens a doctrinal space for extending well-

the judiciary, noting that “[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.”¹³⁸ Because the way to exercise “[t]hat responsibility, however, ‘has not been reduced to any formula,’”¹³⁹ judges must “exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”¹⁴⁰

Reasoned judgment cannot perform its function unless informed by something, and the Court suggested that the judging process “is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements.”¹⁴¹ Judges should consider “[h]istory and tradition [a] guide”¹⁴² rather than as setting “outer boundaries.”¹⁴³ The Court warned that according history and tradition a more privileged status might “allow . . . the past alone to rule the present.”¹⁴⁴ That said, however, courts using history and tradition as a guide might reach the same conclusions in particular cases as courts using history and tradition as the criterion, which means that post-*Obergefell* courts may not be recognizing rights that pre-*Obergefell* courts would not also have recognized. At the very least, it is too early to declare that *Obergefell* marks a major change.¹⁴⁵

After laying out this vision of judging, the *Obergefell* Court implied that this was the method of judging that had been in use by members of the Court for a long time. “Applying these established tenets, the Court has long held the right to marry is protected by the Constitution.”¹⁴⁶ The Court then noted that the right to marry had been recognized in *Loving v. Virginia*, a decision issued in 1967,¹⁴⁷ and reaffirmed that position in *Zablocki v. Redhail*¹⁴⁸ and *Turner v. Safley*.¹⁴⁹ But the Court implied that the recognition of marriage as a fundamental right predated 1967. “Over time and in other contexts, the Court has reiterated that the right to marry

recognized due process rights to new groups, and applying those rights in new contexts. If a litigant cannot persuasively frame her due process claim in terms of a well-recognized right, then *Glucksberg* may be fatal to the claim.”).

138. *Obergefell*, 135 S. Ct. at 2598.

139. *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* (citing *Lawrence*, 539 U.S. at 572).

144. *Obergefell*, 135 S. Ct. at 2598.

145. See Yoshino, *supra* note 125, at 148 (“*Obergefell* became something even more than a landmark civil rights decision. It became a game changer for substantive due process jurisprudence.”); cf. Michael W. McConnell, *Time, Institutions and Interpretation*, 95 B. U. L. REV. 1745, 1782 (2015) (suggesting that *Obergefell* seems “to open the door to whatever new rights might appeal to the sensibilities of five Justices”).

146. *Obergefell*, 135 S. Ct. at 2598.

147. See *Loving v. Virginia*, 388 U.S. 1 (1967).

148. *Obergefell*, 135 S. Ct. at 2598 (“The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).”).

149. *Id.* (“The Court again applied this principle in *Turner v. Safley*, 482 U.S. 78, 95 (1987)”).

is fundamental under the Due Process Clause."¹⁵⁰ Among the cases cited for that proposition was one issued in 1923¹⁵¹ and another issued in 1888.¹⁵²

After suggesting that the right to marry had been recognized for more than three quarters of a century before *Loving*,¹⁵³ the Court made what appeared to be a damning admission:¹⁵⁴ "It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners."¹⁵⁵ Such a comment is surprising. Whether such a claim can be denied depends upon the kind of presumption at issue. If this is a logical presumption and marriage for same-sex couples serves the same purposes as it does for different-sex couples,¹⁵⁶ then the presumption not only can but should be denied. Further, the *Obergefell* Court stated that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples,"¹⁵⁷ so there is an important sense in which that presumption must be denied. But that makes the *Obergefell* Court's statement all the more mysterious.

As support for its claim that marriage was presumed to be for different-sex couples, the Court explained that "[t]his was evident in *Baker v. Nelson*, 409 U.S. 810 (1972), a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question."¹⁵⁸ The explanation for the *Baker* holding was that "[t]he Court, like many institutions, ha[d] made assumptions defined by the world and time of which it [wa]s a part."¹⁵⁹

Yet, the Court failed to note that a mere eleven years before the Court struck down interracial marriage bans in *Loving v. Virginia*,¹⁶⁰ the Court in *Naim v. Naim* refused to hear a challenge to Virginia's interracial marriage ban because "the case [was] devoid of a properly presented federal question."¹⁶¹ Mentioning *Naim* would have put the Court's analysis in a whole different light.

Consider the Court's suggestion that the right to marry presumed different-sex partners, as was indicated by the Court's having denied in an earlier opinion that a challenge to a same-sex union ban implicated federal guarantees. That same reasoning would suggest that the marriage jurisprudence prior to *Loving* presumed relationships between individuals of the same race, as was indicated by

150. *Id.* (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

151. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

152. *See id.* at 2601 (discussing *Maynard v. Hill*, 125 U.S. 190 (1888)).

153. *Loving v. Virginia*, 388 U.S. 1 (1967) was issued 79 years after *Maynard v. Hill*, 125 U.S. 190 (1888).

154. Perhaps not appreciating what the Court was actually admitting, *see infra* notes 189–90 and accompanying text, Chief Justice Roberts expressly noted this statement in his dissent. *See Obergefell*, 135 S. Ct. at 2619 (Roberts, C.J., dissenting) ("As the majority admits, the institution of 'marriage' discussed in every one of these cases 'presumed a relationship involving opposite-sex partners.'").

155. *Obergefell*, 135 S. Ct. at 2598.

156. *Cf. id.* at 2601 ("There is no difference between same- and opposite-sex couples with respect to this principle.").

157. *Id.* at 2599.

158. *Id.* at 2598.

159. *Id.*

160. *See* 388 U.S. 1 (1967).

161. *Naim v. Naim*, 350 U.S. 985, 985 (1956).

the Court's having denied in an earlier opinion that a challenge to an interracial union ban implicated federal guarantees.

Such a claim about presumptions would not have implied that interracial marriages were prohibited everywhere, because interracial marriages were permitted in about half the states when *Naim* was decided¹⁶² and in even more states when *Loving* was issued.¹⁶³ Instead, the presumption would have meant something else—for example, that the Court did not believe that the Federal Constitution required the recognition of interracial marriages.¹⁶⁴

One explanation for why the *Naim* Court might have denied that a federal question was implicated was that the Court might have believed that the regulation of marriage was a matter left for the states.¹⁶⁵ That explanation would seem subject to the following criticism. In an earlier case involving the same parties, the United States Supreme Court remanded the case for further consideration.¹⁶⁶ But, it might be thought, if marriage were simply a matter left to the states, the United States should not have remanded the case the first time but, instead, have said that there was no federal issue implicated.

That said, there is another way to understand what the Court was doing the first time it heard the case. In 1955, the *Naim* Court wrote:

The inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered 'in clean cut and concrete form, unclouded' by such problems.¹⁶⁷

In what respect was the record incomplete? One possibility was that the Court was not sure where the parties were domiciled at the time of the marriage.¹⁶⁸ If, for example, the couple had moved to North Carolina and married there where such marriages were permitted, then the marriage would have been valid in the domicile at the time of the marriage.¹⁶⁹ In that event, a subsequent move to Virginia

162. See *Legal Map: Accessible Version*, LOVINGDAY, <http://lovingday.org/legal-map-accessible> (last visited Oct. 22, 2016).

163. See *Loving*, 388 U.S. at 6 ("Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.").

164. But see *infra* notes 189–90 and accompanying text (suggesting that the Court might not have interpreted federal constitutional guarantees that way).

165. Cf. *Windsor*, 133 S. Ct. at 2689–90 ("By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States."). The *Windsor* Court also noted that state regulation of marriage was subject to federal constitutional guarantees. See *id.* at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons.") (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

166. See *Naim*, 350 U.S. at 891 ("The judgment is vacated and the case remanded to the Supreme Court of Appeals in order that the case may be returned to the Circuit Court of the City of Portsmouth for action not inconsistent with this opinion.").

167. *Id.* (citing *Rescue Army v. Mun. Court*, 331 U.S. 549, 584 (1947)).

168. Strasser, *supra* note 19, at 79 ("The Court might instead have believed that the important issue was whether either of the parties was domiciled in Virginia when the marriage was contracted in North Carolina.").

169. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 243

would have raised issues that could be addressed without speaking to the validity of Virginia's interracial marriage ban.¹⁷⁰

Commentators disagree about why the *Naim* Court denied that interracial marriage bans implicated federal guarantees.¹⁷¹ In any event, just as *Naim* did not settle how *Loving* would be decided, *Baker v. Nelson*¹⁷² did not settle how *Obergefell* would be decided. *Baker* did not settle the matter because there "are other, more instructive precedents,"¹⁷³ and "in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected."¹⁷⁴ Precisely because "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples,"¹⁷⁵ the Court suggested that a position that once had seemed sensible, namely, that same-sex couples could be precluded from marrying, was simply no longer tenable.¹⁷⁶

If the Court had discussed *Naim* and had pointed out that an interracial marriage ban that (allegedly) did not implicate federal guarantees during the fifties nonetheless implicated those guarantees in the sixties, then it might have been easier to understand how a same-sex marriage ban that (allegedly) did not implicate federal guarantees in the 1970s nonetheless implicated such guarantees more than forty years later. But making this history clear would have made *Obergefell* seem less revolutionary.¹⁷⁷

It also would have served other purposes as well, because it would have undercut one of the dissent's criticisms, namely, that interracial marriage bans were not even analogous to same-sex marriage bans. Ironically, Chief Justice Roberts helped illustrate in his dissent why the two kinds of bans were more analogous than many seemed to admit. For example, he noted in his dissent that

(1991) ("Yielding to Frankfurter's importuning, the Court remanded *Naim* to the Virginia Supreme Court on the pretext that the parties' domicile stood in need of clarification."); see also Mark Strasser, *Naming the States Where Loving Will Be Recognized: On Tea Leaves, Horizontal Federalism, and Same-Sex Marriage*, 22 WM. & MARY J. WOMEN & L. 1, 17 (2015) ("Suppose, for example, that Ruby and Han had planned to move to North Carolina where their marriage was legal. In that event, they would have been marrying in accord with the law of the domicile at the time of the marriage.").

170. See *State v. Ross*, 76 N.C. 242, 247 (1877) (upholding the validity of an interracial marriage contracted in another domicile even though such marriages could not be celebrated within the state).

171. See, e.g., Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 449 (2005) ("A majority of the Justices apparently preferred being humiliated at the hands of truculent state jurists to further stoking the fires of racial controversy ignited by *Brown*."); Alexander Tsesis, *Justice at War and Brown v. Board of Education*, 47 HOW. L.J. 361, 379 (2004) ("The Court's refusal to rule on the substance of *Naim* reflected Justice Felix Frankfurter's influence on his fellow Justices, in particular, Earl Warren, Hugo Black, William O. Douglas, and Stanley Reed, who initially wanted to hear the case on the merits."); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 827 (2011) (discussing the view that consequentialist considerations may justify caution as was exemplified in *Naim*).

172. 409 U.S. 810 (1972).

173. *Obergefell*, 135 S. Ct. at 2598.

174. *Id.* at 2599.

175. *Id.*

176. *Id.* at 2602 ("The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.").

177. See Yoshino, *supra* note 125, at 148 (describing *Obergefell* as "a game changer").

"the interracial marriage ban at issue in *Loving* [did not] define marriage as 'the union of a man and a woman of the same race.'"¹⁷⁸ What did the statute at issue in *Loving* state? "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."¹⁷⁹ But Chief Justice Roberts failed to include the wording of some of the statutes banning same-sex marriage. For example, Ohio law specified: "Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void *ab initio* and shall not be recognized by this state."¹⁸⁰ While there were differences between the marriage prohibitions especially because Virginia had criminalized attempting to enter into an interracial marriage,¹⁸¹ it was nonetheless true that both kinds of marriage were treated as void *ab initio* and neither *defined* marriage as excluding a particular kind of union.

In his dissent, Chief Justice Roberts suggested that the Court was somehow seeking "to change the core definition of marriage as the union of a man and a woman."¹⁸² But such a criticism seemed anachronistic, because various states were already recognizing same-sex marriage.¹⁸³ Indeed, the number of states recognizing same-sex marriage at the time *Obergefell* was issued was comparable to the number of states recognizing interracial marriage at the time *Loving* was issued.¹⁸⁴

Members of the Court clearly disagree about whether the state furthers legitimate interests by reserving marriage for different-sex couples, but that disagreement at least can be discussed, for example, by analyzing whether the interests served by recognizing different-sex marriages are also served by recognizing same-sex marriages.¹⁸⁵ But appeals to core definitions are unhelpful as a mode of analysis, especially when the alleged core definition did not reflect the law of almost three quarters of the states.¹⁸⁶

When discussing the presumption that marriage was for individuals of different sexes, the Court was not implying that the purposes of marriage can only be served by individuals of different sexes—on the contrary, the *Obergefell* Court

178. *Obergefell*, 135 S. Ct. at 2619 (Roberts, C.J., dissenting).

179. *Loving*, 388 U.S. at 5 (citing VA. CODE ANN. 20–57 (1960 Repl.Vol.)).

180. OHIO REV. CODE ANN. § 3101.01 (C)(1) (West).

181. *Loving*, 388 U.S. at 5 n.4 ("It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian.") (citing Section 20–54 of the Virginia Code).

182. *Obergefell*, 135 S. Ct. at 2619 (Roberts, C.J., dissenting).

183. See Faith Karimi & Michael Pearson, *The 13 states that still ban same-sex marriage*, CNN (Feb. 13, 2015), <http://www.cnn.com/2015/02/13/us/states-same-sex-marriage-ban/> (discussing the thirteen states that still prohibited same-sex marriage before *Obergefell* was issued).

184. When *Loving* was issued, sixteen states prohibited interracial marriage. See *supra* note 163. When *Obergefell* was issued, thirteen states prohibited same-sex marriage. See *supra* note 183.

185. See *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) ("[D]istinguishing between opposite-sex and same-sex couples is rationally related to the States' 'legitimate state interest' in 'preserving the traditional institution of marriage.'" (citing *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in judgment)). But see *id.* at 2599–601 (discussing why recognizing same-sex marriage promotes both state and individual interests).

186. See *supra* note 183 (noting that only thirteen states did not recognize same-sex marriage when *Obergefell* was issued).

explicitly denied such an assertion.¹⁸⁷ Instead, the Court was discussing what individual justices presumed, which is why it said that “[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.”¹⁸⁸ Here, the Court was echoing an observation made in *Lawrence* that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”¹⁸⁹

Ironically, there may be a reason that the Court decided not to refer to *Naim*. If one accepts that members of the *Naim* Court knew that interracial marriage bans were unconstitutional but did not want to issue that holding for fear of a backlash,¹⁹⁰ then that Court would not have been blinded by the times but instead making a calculation about the timing effects of the decision.¹⁹¹ In contrast, the *Obergefell* Court implied that the *Baker* Court (and, perhaps, the dissenting members of the *Obergefell* Court) were simply blinded by the times.

II. EQUAL PROTECTION

Almost all of the *Loving* Court opinion addressed why Virginia’s interracial marriage ban violated federal equal protection guarantees,¹⁹² and only a short part of the opinion addressed why that ban violated due process guarantees.¹⁹³ Some

187. See *Obergefell*, 135 S. Ct. at 2599–601 (noting the various interests served by recognizing same-sex marriage).

188. *Id.* at 2602.

189. *Lawrence*, 539 U.S. at 579. See also Yoshino, *supra* note 125, at 163 (noting that in *Obergefell* “[i]t was all [discussed] there again—the problem of the blindness of each generation”).

190. See Rebecca Schoff, *Deciding on Doctrine: Anti-Miscegenation Statutes and the Development of Equal Protection Analysis*, 95 VA. L. REV. 627, 637 (2009) (“Internal correspondence between Court members at the time indicates that the prospects of further backlash influenced the Court when it chose to avoid confronting anti-miscegenation statutes in these cases.”); Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PA. J. CONST. L. 377, 409 n.122 (2012) (“The Court did not want to decide the case immediately after *Brown v. Board of Education*, 347 U.S. 483 (1954), for fear of a massive backlash and greater resistance to the Court’s holding that schools must desegregate.”).

191. Cf. Nancy Scherer, *Viewing the Supreme Court’s Marriage Cases Through the Lens of Political Science*, 64 CASE W. RES. L. REV. 1131, 1152 (2014) (“In a speech at Columbia University Law School in early 2012, Ginsburg explained that judicial restraint can sometimes be a more effective policy choice for the justices than making an expansive, aggressive decision like *Roe*: ‘It’s not that the judgment was wrong, but it moved too far too fast.’”).

192. Jessica Knouse, *Civil Marriage: Threat to Democracy*, 18 MICH. J. GENDER & L. 361, 391 (2012) (“[M]ost of the Court’s opinion in *Loving* focused on equal protection rather than substantive due process”); Strasser, *supra* note 29, at 190 (“While *Loving* establishes the fundamental right to marry, most of that opinion was focused on the equal protection aspect of the interracial marriage ban.”); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1197 (2004) (“*Loving* is primarily thought of as an equal protection case”).

193. Shuler, *supra* note 29, at 263 (“The bulk of the *Loving* opinion relied on equal protection to strike down the anti-miscegenation law, however Chief Justice Warren’s opinion also briefly but explicitly relied upon the Fourteenth Amendment’s substantive due process clause.”); Jeremiah Egger, Glucksberg, *Lawrence*, and the Decline of *Loving’s* Marriage Precedent, 98 VA. L. REV. 1825, 1828 (2012) (“While *Loving* is primarily an equal protection case, Chief Justice Warren’s opinion closes with a succinct and forceful due process analysis”).

commentators have suggested that the *Obergefell* Court missed a golden opportunity by not holding that same-sex marriage bans violate equal protection guarantees.¹⁹⁴ Just as the *Loving* Court struck down interracial marriage bans as a violation of both substantive due process and equal protection guarantees, the *Obergefell* Court might have adopted a similar approach.¹⁹⁵ Yet, the confusing aspect of the opinion is not that the *Obergefell* Court failed to mention equal protection but, instead, what to make of what the Court actually said.

A. *Obergefell*'s Equal Protection Approach

In holding that same-sex couples can exercise the fundamental right to marry, the Court provided the basis for striking down same-sex marriage bans without even addressing equal protection concerns. But the Court did discuss equal protection, albeit in a way that is likely to yield more confusion rather than less.¹⁹⁶

After holding that the right to marry a same-sex partner was included within the right to marry,¹⁹⁷ the Court noted that equal protection was also implicated. "The right of same-sex couples to marry . . . is derived, too, from [the Fourteenth] Amendment's guarantee of the equal protection of the laws."¹⁹⁸ The Court explained that "[r]ights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other."¹⁹⁹ Thus, the Court suggested that equal protection and due process guarantees may but need not inform their respective reaches.

By way of explanation, the Court discussed two of the marriage cases, *Loving* and *Zablocki*.²⁰⁰ The *Obergefell* Court noted that the *Loving* "Court first declared the [marriage] prohibition invalid because of its unequal treatment of interracial couples,"²⁰¹ and then "[w]ith this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty."²⁰² While the *Obergefell* Court is correct that in *Loving* the equal protection analysis was offered first²⁰³ and then only later was the due process analysis included,²⁰⁴ the Court nonetheless risks confusion by framing the opinion this way—the Court leaves open whether

194. Mayeri, *supra* note 77, at 131 ("The omission of a sex or sexual orientation discrimination analysis in *Obergefell* understandably disappointed many observers.").

195. Peter Nicolas, *Obergefell's Squandered Potential*, 6 CAL. L. REV. CIR. 137, 140 (2015) ("Even if Justice Kennedy felt it necessary to reach the fundamental rights claim in *Obergefell* and overrule the Court's summary dismissal of such a claim in *Baker v. Nelson*, he could again have followed the *Loving* example and rendered a decision declaring the statute unconstitutional on both substantive due process and class-based equal protection grounds.").

196. See *infra* notes 197–248 and accompanying text.

197. *Obergefell*, 135 S. Ct. at 2604–05 ("The Court now holds that same-sex couples may exercise the fundamental right to marry.").

198. *Id.* at 2602.

199. *Id.* at 2603.

200. See *id.*

201. *Id.*

202. *Id.*

203. *Loving*, 388 U.S. at 7–12.

204. *Id.* at 12.

the due process analysis (holding that the interest in marriage is fundamental) is in some way dependent upon the finding that equal protection guarantees had been violated.²⁰⁵

Allegedly, *Zablocki* also illustrated “[t]he synergy between the two protections,”²⁰⁶ where “the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law.”²⁰⁷ In *Zablocki*, “[t]he equal protection analysis depended in central part on the Court’s holding that the law burdened a right ‘of fundamental importance.’”²⁰⁸ That is correct, precisely because the classification at issue in *Zablocki*—indigency—did not trigger heightened review.²⁰⁹ But this only makes the *Obergefell* Court’s position more opaque, given the lack of work equal protection seems to be doing in *Zablocki*.²¹⁰ As Justice Stewart pointed out in his *Zablocki* concurrence in the judgment: “The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications.”²¹¹ The constitutional difficulty posed by the Wisconsin statute was that “it exceed[ed] the bounds of permissible state regulation of marriage, and invade[d] the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.”²¹²

The *Obergefell* opinion did include the language one might expect in an analysis striking down a statute on equal protection grounds—“[t]he imposition of this disability on gays and lesbians serves to disrespect and subordinate them.”²¹³ The Court had used similar language in previous opinions. For example, when striking down a state constitutional amendment precluding affording anti-discrimination protection on the basis of orientation, the Court noted in *Romer v. Evans*²¹⁴ that the amendment at issue “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”²¹⁵ So, too, in *United States v. Windsor*, the Court struck down the Defense of Marriage Act at least in part because of its attempted “interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.”²¹⁶ But at least one of the questions at issue in *Obergefell* was whether the State’s classifying on the basis of the sexes or orientations of the parties was itself a sufficient ground for striking the bans.²¹⁷ While the Court wrote that same-sex

205. Cf. *supra* notes 29–33 and accompanying text.

206. *Obergefell*, 135 S. Ct. at 2603.

207. *Id.*

208. *Id.* (citing *Zablocki*, 434 U.S. at 383).

209. See *supra* note 32 and accompanying text.

210. But see *infra* notes 226–39 and accompanying text.

211. *Zablocki*, 434 U.S. at 391 (Stewart, J., concurring in the judgment) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring opinion)).

212. *Id.* at 391–92 (Stewart, J., concurring in the judgment).

213. *Obergefell*, 135 S. Ct. at 2604.

214. 517 U.S. 620 (1996).

215. *Id.* at 635.

216. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

217. Commentators disagree whether *Obergefell* foreshadows recognizing orientation as a quasi-suspect class. Compare Dena H. Sokolow, *Governmental Agencies Can Be Our Guides to Future Trends in*

marriage bans “abridge central precepts of equality,”²¹⁸ the Court left open whether it would strike down “unjustified inequality [even when not] within our most fundamental institutions.”²¹⁹ It is thus difficult to tell whether after *Obergefell* the Court will strike down statutes discriminating on the basis of sexual orientation when mere liberty interests are at issue.²²⁰

B. Obergefell’s Equal Protections Implications

Some commentators have already noted that the Court has sometimes combined liberty and equality in its analyses of which statutes pass muster.²²¹ The Court reinforced the accuracy of that observation when suggesting that “[r]ights implicit in liberty and rights secured by equal protection . . . in some instances . . . may be instructive as to the meaning and reach of the other.”²²² Nonetheless, that suggestion was worrisome because the examples offered by the Court were at best ambiguous. *Zablocki* is often discussed as a case involving due process *rather than* equal protection.²²³ The point is not to deny that *Zablocki* stated that it was doing equal protection analysis,²²⁴ but merely to suggest that the level of scrutiny was likely not increased because of the equal protection aspects of the case and that the statute’s constitutionality would have been upheld had a mere liberty interest been at stake.²²⁵

Employment Law, ASPATORE, 2015 WL 9875511 *1, at *2 (“*Obergefell* is not a broad guarantee of protection against sexual orientation discrimination in the workplace, but it is likely a preview of future developments in employment law and a shift toward eventual recognition of sexual orientation and gender identity as a protected class.”) with Ann L. Schiavone, *Unleashing the Fourteenth Amendment*, 2016 WIS. L. REV. FORWARD 27, 28 (2016) (“*Obergefell* potentially signal[s] a shift away from declaration of new rights and suspect classes, while applying a stronger rational basis test.”).

218. *Obergefell*, 135 S. Ct. at 2604.

219. *Id.* at 2603.

220. See Kyle C. Velte, *Obergefell’s Expressive Promise*, 6 HOUS. L. REV. 157, 161 (2015) (suggesting that *Obergefell* “will not prohibit discrimination against LGBT individuals in other contexts”); but see Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 329 (2015) (“But it now will be difficult indeed—even in a *non*-fundamental rights case—for government to justify using sexual orientation as a basis for denying liberty interests.”). See also Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3, 21 (2015) (“Whether *Obergefell* will bode well for civil rights litigation, as I believe it has the power to, or will further undermine attempts to achieve at least formal equality, we will know only with the passage of time.”).

221. See Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1449 (2004) (“[L]iberty and equality are more intertwined.”).

222. *Obergefell*, 135 S. Ct. at 2603.

223. See, e.g., *Turner v. Safley*, 482 U.S. 78, 95 (1987) (“the decision to marry is a fundamental right under *Zablocki v. Redhail*, 434 U.S. 374 (1978)); *Block v. Rutherford*, 468 U.S. 576, 600 n.11 (1984) (Marshall, J., dissenting) (describing *Zablocki* as “invalidating a statute that, as applied to most persons, seriously intruded upon, but did not abrogate, the right to marry”); *Washington v. Harper*, 494 U.S. 210, 224 (1990) (“In *Turner* itself we applied the reasonableness standard to a prison regulation that imposed severe restrictions on the inmate’s right to marry, a right protected by the Due Process Clause.”); see also *Turner*, 482 U.S. at 95–96 (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978)); *Schall v. Martin*, 467 U.S. 253, 307 (1984) (Marshall, J., dissenting) (describing *Zablocki* as “striking down a statute that conditioned the right to marry upon the satisfaction of child-support obligations.”).

224. *Zablocki*, 434 U.S. at 382 (“[T]he statute violates the Equal Protection Clause.”).

225. See *supra* note 35 and accompanying text.

Nonetheless, the Court could be suggesting that the class at issue in *Zablocki* did some work in the opinion *sub silentio*.²²⁶ A different case cited by the Court,²²⁷ *M.L.B. v. S.L.J.*,²²⁸ also extended protection to an impoverished individual, holding that “Mississippi may not deny M. L. B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent.”²²⁹ Parenting rights also implicate a fundamental interest,²³⁰ so perhaps *Obergefell*, *Zablocki*, and *M.L.B.* all involve these hybrids.

The *Obergefell* Court also discussed *Loving*, which is traditionally viewed as providing two independent justifications for striking down the Virginia antimiscegenation law.²³¹ However, describing the guarantees as working together²³² might be taken to imply that the equal protection or due process guarantees, standing alone, would not suffice to justify striking down the statute.

In some sense, equal protection and due process work together as a general matter. When the state precludes some from enjoying a benefit that others enjoy, the state is distinguishing between classes of individuals and those denied the benefit might at least claim that they were not being treated equally.²³³ Further, individuals claiming to be harmed are presumably claiming that some interest is at stake, so due process would be implicated at least to the extent that the contested statute would be to be rationally related to a legitimate state interest.²³⁴ Thus, there

226. See Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 73 (1992) (“The combination of treating the poor differently from the rich with the right to marry . . . persuaded the Court.”); C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431, 466 (2004) (“*Zablocki*, like *Loving*, stands for the proposition that the right to marry is a protected liberty interest, but only state interference that employs a method that allocates that right differently with respect to some groups than to others is unconstitutional.”).

227. See *Obergefell*, 135 S. Ct. at 2603.

228. 519 U.S. 102 (1996).

229. *Id.* at 107.

230. See *id.* at 109 (discussing the importance of the right at issue); see also *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) (“When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.”).

231. Jamal Greene, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989, 1991–92 (2005) (“*Loving v. Virginia*, which held Virginia’s antimiscegenation laws unconstitutional, was decided on two independent and equally adequate grounds.”).

232. Cf. R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53, 55–56 (2015) (suggesting that *Loving* “supports the ‘double helix’ approach resurrected in *Obergefell* to the extent that it relies on both equality and due process-based principles in invalidating Virginia’s interracial marriage ban”).

233. David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 798 (1991) (“All statutes operate through classification. Thus, statutes always treat people as members of groups and, in general, legislatures are free to classify so long as they pursue their permissible objectives rationally.”). Cf. John C. Philo, *Local Government Fiscal Emergencies and the Disenfranchisement of Victims of the Global Recession*, 13 J. L. SOCIETY 71, 93 (2011) (“Many statutes classify persons into groups and treat the groups differently without raising constitutional concerns.”).

234. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 789 (1986), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (White, J. dissenting) (“State action impinging on individual interests need only be rational to survive scrutiny under the Due Process

might seem to be no harm in talking about both kinds of guarantees being implicated in that it should not be difficult to talk about some sense in which both equal protection (perhaps involving the lowest level of scrutiny)²³⁵ and the due process guarantees (perhaps involving the lowest level of scrutiny)²³⁶ are implicated.

Yet, that approach carries risks if only because of how it might be construed. If due process and equal protection are (almost) always implicated, then requiring both to be triggered will not help determine which interests should be protected and which not. The Court will still have to find some way to distinguish among interests. But this means that characterizing the jurisprudence as involving both liberty and equality may well not result in the recognition of many new rights if only because of the Court's ever-present desire to avoid opening floodgates.²³⁷ For

Clause, and the determination of rationality is to be made with a heavy dose of deference to the policy choices of the legislature."'). See also Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 348 (1991) (discussing "the generic doctrine that substantive due process shields individuals from arbitrary, capricious government misconduct").

235. See Jacquelyn M. Meirick, *Through the Tiers: Are Iowa's New Sex-Offender Laws Unconstitutional?*, 96 IOWA L. REV. 1013, 1023 n.65 (2011) ("Rational-basis review is the lowest level of constitutional scrutiny in deciding due-process and equal-protection claims under the U.S. Constitution."); Susan E. Hauser, *More Than Abstract Justice: The Defense of Marriage Act and the Equal Treatment of Same-Sex Married Couples Under Section 302(a) of the Bankruptcy Code*, 85 AM. BANKR. L.J. 195, 219 (2011) ("Rational basis review is the lowest level of scrutiny that can be applied to a law challenged as violating the plaintiff's right to equal protection.").

236. Lynne Marie Kohm, *Liberty and Marriage-Baehr and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253, 258 (1998) ("The rational relationship test is the lowest level of due process scrutiny and is applied in the absence of a fundamental right."); Matthew R. Madara, *Constitutional Law—Sacrificing the Good of the Few for the Good of the Many: Denying the Terminally Ill Access to Experimental Medication*, 31 W. NEW ENG. L. REV. 535, 554 n.112 (2009) ("Rational basis scrutiny is the lowest level of judicial review that courts will apply in due process cases. This test is applied when the plaintiff is asserting a right that is not fundamental under the Constitution. Government regulation of such a right is permissible so long as there is a legitimate interest for the government's regulation.").

237. See *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1172 (2014) ("There is scant evidence, however, that these floodgate-opening concerns are more than hypothetical."); *Henderson v. United States*, 133 S. Ct. 1121, 1130 (2013) ("And there are other reasons for concluding that our holding will not open any 'plain error' floodgates."); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 753 (2012) ("Arrow's floodgates argument assumes 'a shocking degree of noncompliance' with the Act . . . and seems to us more imaginary than real."); *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("We confronted a similar 'floodgates' concern . . . but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty A flood did not follow in that decision's wake."); *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 481–82 (1978) ("As we stated in *Switzerland Cheese Assn., Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 [1966], 'we approach this statute [§ 1292(a)(1)] somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders.'"); *Switzerland Cheese Ass'n. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966) ("[W]e approach this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders."); see also *Wilkie v. Robbins*, 551 U.S. 537, 569 (2007) (Ginsburg, J., concurring in part and dissenting in part) ("Allowing Robbins to pursue this suit, the Court maintains, would open the floodgates to a host of unworthy suits 'in every sphere of legitimate governmental action affecting property interests.'"); *Schiro v. Landrigan*, 550 U.S. 465, 499 (2007) (Stevens, J., dissenting) ("In the end, the Court's decision can only be explained by its increasingly familiar effort to guard the floodgates of litigation."); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 58–59 (1981) (Blackmun, J.,

example, in *M.L.B.*, the Court rejected that its holding posed a floodgates difficulty because “parental status termination decrees [are set] apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody.”²³⁸ This suggests that analyzing issues in terms of a combination of due process and equal protection guarantees could result in fewer rather than additional interests being protected. At the very least, those celebrating the approach in *Obergefell* as beginning a new dawn with respect to the recognition of rights²³⁹ may well be doing so prematurely.

The *Obergefell* Court made clear that it was only “in some instances”²⁴⁰ that “[r]ights implicit in liberty and rights secured by equal protection . . . each may be instructive as to the meaning and reach of the other.”²⁴¹ The Court was not offering a more restrictive Fourteenth Amendment jurisprudence such that only cases involving interests triggering closer scrutiny and classes triggering closer scrutiny would yield protected rights,²⁴² and there was no suggestion of a hybrid analysis requirement analogous to that used in free exercise jurisprudence.²⁴³ Nonetheless, it would not be surprising if some courts were to read the opinion this way,²⁴⁴ if only because the (sometimes required?) “synergy between the two protections”²⁴⁵ could be read in a way that is more expansive but also in a way that is more restrictive.

Obergefell would have been more promising as a source of increased protections had it cited *Plyer v. Doe*²⁴⁶ as an example of the discussed synergy,

dissenting) (“It will not open the ‘floodgates’ that, I suspect, the Court fears.”); *Rummel v. Estelle*, 445 U.S. 263, 304 (1980) (Powell, J., dissenting) (“[A] ‘floodgates’ argument can be easy to make and difficult to rebut.”).

238. *M.L.B.*, 519 U.S. at 127.

239. See Kenji Yoshino, *Supreme Court Breakfast Table: Obergefell Recognizes the Connection between Liberty and Equality*, SLATE (June 25, 2016), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_obergefell_v_hodges_links_liberty_and_equality.html

(“For those who have despaired about the recognition of ‘new’ constitutional rights, such as the right to education or health care, that may be the lasting impact of this opinion.”); Nicolas, *supra* note 60, at 334 (discussing the view that “the *Obergefell* decision was groundbreaking not only for its specific holding regarding the right of same-sex couples to marry, but also more broadly for altering the way in which the Court will recognize fundamental rights in the future”).

240. *Obergefell*, 135 S. Ct. at 2603.

241. *Id.*

242. See *id.* (“Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive . . .”).

243. See *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 881 (1990) (“The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.”); see also *id.* at 882 (rejecting the use of strict scrutiny because “[t]he present case does not present such a hybrid situation”).

244. Cf. David A. Strauss, *Foreword: Does the Constitution Mean What It Says*, 129 HARV. L. REV. 1, 6–8 (2015) (“The Court in *Obergefell* explicitly conflated the Due Process and Equal Protection Clauses . . .”).

245. *Obergefell*, 135 S. Ct. at 2603.

246. 457 U.S. 202 (1982).

because the Court there seemed to use heightened scrutiny²⁴⁷ notwithstanding the absence of a protected class or fundamental interest.²⁴⁸ But the *Obergefell* Court did not even cite *Plyler*, so the best way to interpret the decision will have to await further developments in the jurisprudence.

CONCLUSION

Obergefell is an important decision with much promise. Like most if not all Supreme Court opinions, the decision is open to interpretation, although the *Obergefell* Court seemed to go out of its way to make matters open-ended. While the Court did wax eloquent about the benefits of marriage, that made sense from the perspective of those challenging the bans—they were in non-marital relationships and were arguing that they were being harmed by their state's refusal to permit them to marry.

The Court's due process and equal protection analyses are open-ended in a few respects. The Court's restriction of *Glucksberg* represents an admission that the decision did not reflect the method used by the Court to determine which rights are fundamental. But using history and tradition as a guide rather than as a strictly enforced limiting principle (except when it is not enforced) may not result in different holdings as a practical matter. One might expect, though, that the lower courts will vary more markedly in their analyses—some will be more willing to recognize new rights, whereas others will be no more willing to recognize that interests are protected than they would have been were *Glucksberg* vigorously enforced.

Equal protection is similarly more open-ended. The *Obergefell* Court suggested that equal protection informed its decision, while at the same time not recognizing sexual orientation as a protected class. Perhaps in light of *Romer*, *Lawrence*, *Windsor* and *Obergefell* the Court will soon announce that orientation is suspect or quasi-suspect. Perhaps not. In any event, some lower courts will be more willing to strike down laws adversely affecting important (but not fundamental) interests of non-protected classes, whereas others may require some combination of heightened scrutiny for the interests and the class at issue before striking down a challenged law.

Obergefell is open-ended in another way. The Supreme Court of the future considering *Obergefell* will find much in the decision to support its preferred view, whether that view involves expanding or restricting the protection of classes or interests. *Obergefell* is written in such a way that it can readily be used to support opposing constitutional perspectives, which means that the next few appointments to the Court will likely do much to determine *Obergefell*'s legacy.

247. See *id.* at 244 (Burger, C. J., dissenting) (“[B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.”).

248. *Id.* (Burger, C. J., dissenting) (“[T]he Court expressly—and correctly—rejects any suggestion that illegal aliens are a suspect class . . . or that education is a fundamental right.”).